IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 348

ANDREW JORDAN, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION,

Petitioner,

vs.

SAM DE GEORGE,

Respondent.

PETITION FOR REHEARING.

THOMAS E. DOLAN,
Attorney for Respondent.

SHERLOCK J. HARTNETT,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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POINTS RELIED ON.

I. The Court erred in broadening the word "fraud" to include those instances where a taxpayer fails to pay a tax to the taxing bodies.

II. The Court erred in failing to inquire into the legislative history to determine and construe a vague and ambiguous statute.

(a) The Court erred in construing a doubtful statute against the respondent.

III. Mr. Associate Justice Tom C. Clark should have disqualified himself from a consideration of this cause.

ARGUMENT.

I.

The Court Erred in Broadening the Term "Fraud" to Include Those Instances Where a Taxpayer Fails to Pay a Tax to the Taxing Bodies.

The respondent respectfully urges the Court to reconsider its ruling that any crime which contains an ingredient of fraud involves moral turpitude. The Court properly limited the problem to whether this particular offense involved moral turpitude. "Whether or not certain other offenses involve moral turpitude is irrelevant and beside the point." The Court then proceeds to enumerate *other offenses* which have been adjudged as involving moral turpitude: Obtaining goods under fraudulent pretenses; conspiracy to defraud by deceit and falsehood; forgery with intent to defraud; using mails to defraud; execution of chattel mortgage with intent to defraud; concealing assets in bankruptcy; issuing checks with intent to defraud.

In each instance recited by the Court it will be observed that the crime consisted of fraud upon another individual—the taking away from another of his goods and property. This respondent contends there is a vast difference between the "criminal" who fails to pay a just and existing obligation or debt, to wit, a tax, and the criminal who passes worthless checks to obtain the wares of the seller.

> "* * * and surely it is quite beyond measure to compare its disrepute with defrauding an individual." *U. S. ex rel. Berlandi* v. *Reimer*, 113 F. 2d 429, 431 (L. Hand dissenting).

The majority states that *without exception* American Courts have found that fraud commits any crime to the

category "involving moral turpitude." The lower Court discussed *United States* v. *Carrollo*, D. C. W. D. Mo., 30 F. Supp. 3, 7, wherein the District Court said:

> "* * * We are not prepared to rule that an attempt to evade the payment of a tax due the nation, or the commonwealth, or the city, or the school district, wrong as it is, unlawful as it is, immoral as it is, is an act evidencing baseness, vileness or depravity of moral character. The number of men who have at some time sought to evade the payment of a tax or some part of a tax to some taxing authority is legion. Any man who does that should be punished civilly or by criminal sentence, but to say that he is base or vile or depraved is a misuse of words."

In the *Carrollo* case the alien had entered a plea of guilty to violation of 26 U. S. C. 145 (b), which provides for a $10,000.00 fine or imprisonment of not more than five years, or both, upon conviction of any person who fails to collect, account for or pay over any tax which such person is required by the section to so collect and pay over to the Government.

The *Carrollo* proceeding was under a section of the Internal Revenue Code which does not use the term "fraud" but rather employs the words "defeat or evade." The ruling of this Court rests upon the premise that Sam De George perpetrated a fraud upon the Government. Technically he was indicted under a fraud statute (18 U. S. C. 371), but in fact he was attempting to defeat or evade a tax due the United States.

II.

The Court Erred in Failing to Inquire Into the Legislative History to Determine and Construe a Vague and Ambiguous Statute.

(a) The Court erred in contruing a doubtful statute against the respondent.

In this cause the Court was asked to construe the admittedly vague terminology "moral turpitude" as witness the discussion of the majority and vigorous dissent. In the case of *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, the Court was called upon to construe the seemingly well-defined term "sentenced more than once" and Mr. Justice Douglas, speaking for the unanimous Court, reiterated that fundamental policy of statutory construction (p. 10):

> "* * * But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

The Court in *Fong Haw Tan* saw need to give a detailed review of the Congressional Record and Committee Report (p. 9) to determine the Congressional meaning of the words "sentenced more than once" but did not deem such appraisal necessary to determine the phraseology "crimes involving moral turpitude." The respondent urges a re-reading of the legislative history as set forth in Section I of Respondent's Brief.

It is the duty of the Courts to determine the legislative intent and to enforce the law according to that intent, if that intent is reasonably deducible from the legislation enacted. The Courts should never in considering a statute put a strained construction thereon, or one that

produces unreasonable results. Chief Justice Marshall said in *Pennington* v. *Coxe*, 2 Cranch 33, 59:

> "* * * It is the duty of the Court to discover the intention of the legislature and to respect that intention."

The appeal in this matter was admittedly taken to give the Immigration Department instructions and a definition of the term involved. The decision merely decides that Sam De George must go back to Italy. Rather than define or construe the terms, the Court has found that it embraces any crime in which fraud is an ingredient and thereby opening the door to a flood of warrants to deport aliens not intended by Congress when it enacted 19 (a) of the Immigration Act of 1917 (8 U. S. C. 155(a)).

The problem is still left to the moral reactions of the particular judge called upon to determine the question as stated in *Schmidt* v. *United States*, 177 F. 2d 450, 451:

> "* * * The situation is one in which to proceed by any available method would not be more likely to satisfy the impalpable standard, deliberately chosen than that we adopted in the foregoing cases; that is, to resort to our own conjecture, fallible as we recognize it to be."

III.

Mr. Associate Justice Tom C. Clark Should Have Disqualified Himself from a Consideration of This Cause.

The initial warrant for arrest of alien was taken out by the Department of Justice on the 10th day of October, 1941 (R. 10-11), and the matter has been prosecuted by the Department since that date. The respondent filed his petition for a writ of habeas corpus on March 8, 1949 (R. 2-4), and a return to said writ was made on March 16, 1949, by Otto Kerner, Jr., United States District Attorney

for the Northern District of Illinois (R. 5-10). The District Court for the Northern District of Illinois, Eastern Division, on October 3, 1949, dismissed the writ of habeas corpus and remanded the petitioner to the custody of the immigration officials, which dismissal was reversed by the Circuit Court of Appeals for the Seventh Circuit. The office of the Attorney General has vigorously prosecuted this matter since its inception.

It is respectfully suggested that Mr. Associate Justice Tom C. Clark should have disqualified himself from a consideration of this cause.

Conclusion.

It is respectfully prayed that this petition for rehearing be granted with or without oral argument, as the Court shall so order, and that upon such rehearing the order entered herein on the 7th day of May, 1951, be reversed.

Respectfully submitted,

THOMAS F. DOLAN,
Attorney for Respondent.

SHERLOCK J. HARTNETT,
Of Counsel.

CERTIFICATE.

Counsel for Respondent certifies that this petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified.

THOMAS F. DOLAN,
Attorney for Respondent.